



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, WARSAME & MURGOR, J.J.A)**

**CRIMINAL APPEAL NO. 313 OF 2012**

**BETWEEN**

**MUEMI NZALE WAMBUA.....1<sup>ST</sup> APPLICANT**

**STEPHEN NZALE WAMBUA.....2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the Judgment of the High Court at Machakos (Justice Asike Makhandia, J.) delivered on 15<sup>th</sup> May 2012 in Criminal Case No. 102 of 2008)**

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**RULING OF THE COURT**

**Muemi Nzale Wambua, the 1<sup>st</sup> applicant and Stephen Nzale Wambua, the 2<sup>nd</sup> applicant** have brought their applications under **rule 29** of the **Court of Appeal Rules** seeking to be allowed to produce new evidence in respect of their appeals to this Court.

As a brief background to the applications, the applicants were charged with the offence of murder contrary to **section 203** as read with **section 204 of the Penal Code** in that, on the 8<sup>th</sup> September 2008 at about 4 p.m. at Kauma Location in Kitui District of the former Eastern Province, they allegedly murdered **Kitheka Muthui (the deceased)**.

After hearing the witness evidence, and the applicants' defences, the High Court found the applicants' guilty as charged and sentenced them to death as by law prescribed.

The applicants were aggrieved by the High Court's decision and have appealed to this Court. Prior to the hearing of their appeals, the 1<sup>st</sup> and 2<sup>nd</sup> applicants filed the applications set out below seeking to adduce new evidence.

By a Notice of Motion lodged on 17<sup>th</sup> June 2016, the 1<sup>st</sup> applicant sought orders;

1. to produce new evidence;
2. to produce the court file in Chief Magistrates Court Civil Suit No. 110 of 2001 at Kitui; and
3. for the court do remit the proceedings to the superior court with appropriate directions.
4. for costs be provided for.

The application was supported by the affidavit of the 1<sup>st</sup> applicant sworn on 17<sup>th</sup> June 2016, where it was deponed that the evidence sought to be produced was not made available at the trial, and that it was relevant so as to enable the court reach a merited and different finding; that the evidence would demonstrate that there was no motive on the 1<sup>st</sup> applicant's part or any intention to cause the deceased's death; that the inadequacy of the evidence that was produced in court was on account of the 1<sup>st</sup> applicant's counsel's limitations.

By another Notice of Motion lodged on 16<sup>th</sup> February 2016, the 2<sup>nd</sup> applicant, sought orders;

1. to produce additional and new evidence;
2. for the OCS Kitui Police Station produce Occurrence Book extract of 8<sup>th</sup> September 2008 in Court
3. for this Court to remit the proceedings to the superior court with appropriate directions;
4. for costs be provided for.

The application was made on the grounds that at the applicant's trial, though he was represented, he was not afforded a proper legal counsel, nor was he provided with an expert by the State which was contrary to the requirements of **Article 50 of the Constitution**; that during the trial PW 10 testified that the complainant (the deceased) stated that he had reported the assault to the Kitui Police Station police, but no Occurrence Book extract was produced as an exhibit; that the respondent would not suffer any prejudice if the extract was produced; and that in the interest of justice, the 2<sup>nd</sup> applicant should be allowed to produce the additional evidence.

The application was supported by the 2<sup>nd</sup> applicant's affidavit sworn on 15<sup>th</sup> February 2015, wherein the deponent largely reiterated the grounds of the application.

Submitting in respect of the 1<sup>st</sup> applicant's application, learned counsel **Mr. Kaniu** stated that the production of the court file in *Chief Magistrates' Court Civil Suit No. 110 of 2001* at Kitui would assist this Court in appreciating that the 1<sup>st</sup> applicant and the deceased were brothers, but their blood relationship had been denied during the trial. Counsel asserted that the verdict in the civil suit in the Chief Magistrates' court would enable this Court determine whether malice was established on the 1<sup>st</sup> applicant's part which would result in the decision of the High Court being overturned.

Turning to the 2<sup>nd</sup> applicant's motion, counsel submitted that the production of the extract of the Occurrence Book of 8<sup>th</sup> September 2006 at Kitui Police Station was necessary as, the deceased had lodged a complaint against one accused person, but that two people were arrested and charged with the offence, which was questionable. Counsel asserted that the Occurrence Book extract would assist the Court to address this anomaly.

Finally counsel submitted that, the applicants' motions were exceptional in nature on account of the applicants' counsel's oversight and failure to produce the crucial documents during the trial.

**Mr. Gitonga**, learned counsel for the State opposed the applications and submitted that regarding the 1<sup>st</sup> applicant's motion, counsel submitted that no evidence of motive was adduced during the trial to necessitate production of the *Chief Magistrates' Civil Suit no. 110 of 2011 at Kitui*, and that in any event, under **section 9 (3) of the Penal Code**, motive is immaterial in so far as criminal culpability for murder is concerned. Counsel further submitted that the issues of motive and malice afore thought based on the injuries the deceased sustained were properly addressed in the judgment. It was pointed out that, the evidence was clear as to the relationship between the applicants and the deceased and that the applicants' defences were not premised on family disputes or other grievances between the parties; that therefore, no further evidence was necessary in this regard.

With respect to the 2<sup>nd</sup> applicant's application seeking production of an extract from the Occurrence Book, counsel submitted that the evidence in question was indicated at Page 41 of the record, in the evidence of PW10, and therefore the actual extract was unnecessary; that in addition, the 1<sup>st</sup> applicant was represented by counsel who did not request for production of the Occurrence Book which extract would not add any value to the appeal, and merely amounted to a fishing expedition.

Counsel concluded by submitting that no attempt was made to separate the applicants' defences, and that they were at all times aware of the charges they were facing.

Under **rule 29 (1) (b) of the Court of Appeal Rules**, this Court is empowered to take additional evidence, or to direct that additional evidence be taken by a trial court. This being an exercise in discretion by this Court, with any caveat being that it has to be exercised judiciously with reason and not caprice or whim. The parties must provide the Court with sufficient basis upon which to exercise its discretion to allow an application to take additional evidence.

In the case of ***Brown Tunje Ndago vs Republic [2013] eKLR***

**(Criminal Appeal (Application) No. 12 of 2012)** this Court stated that;5

**“This Court has jurisdiction to admit additional evidence only where there is a pending appeal in this Court from a decision of the superior court in its original jurisdiction such as where the superior court has convicted a person for murder or treason. In other words, this Court will only be seized of jurisdiction to entertain the application in situations in which it is acting as a first appellate court from the decision of the superior court.”**

In ***The Administrator, HH The Aga Khan Platinum Jubilee Hospital vs Munyambu [1985] KLR 127*** it was held that: -

**“1. In exercising its discretion to grant leave to adduce additional evidence under rule 29 (1) (b) of the Court of Appeal**

**Rules, the Court of Appeal will generally give such leave if the evidence sought to be adduced could not, with reasonable diligence, have been obtained for use at the trial, if it will probably have an important influence on the result of the appeal, and is apparently credible though it need not be incontrovertible. Such evidence will be admitted if some assumption basic to both sides has been clearly falsified by subsequent events and where to refuse the application would affront common sense or a sense of justice.”**

In the case of **Joginder Auto Service Ltd vs Mohammed Shaffique & Another [2001] eKLR (Civil Appeal (Application) No. Nai. 210 of 2000)** this

Court stated;

**“Rule 29(1) (b), of the Rules does not set out what constitutes sufficient reason. But this Court and other courts in different common law jurisdictions have, over the years, enunciated principles to guide the courts in applications for leave to adduce additional evidence....**

**In summary these and several other cases decided that the power of the court and more particularly this Court, to receive further evidence is discretionary, which discretion is exercised on three broad principles, namely:**

**(1)The applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.**

**(2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and**

**(3)The evidence must be apparently credible, although it need not be incontrovertible.**

**These are general principles, but we cannot say that they are the only ones. The relevant rule authorising the adduction of additional evidence uses a general phrase, namely, “sufficient reason.””**

Essentially therefore, for this Court to exercise its discretion in favour of the applicant’s application for admission of additional evidence, the applicants must establish first that the Court has jurisdiction to entertain the application and upon satisfying this first threshold, the applicant would then have to satisfy three requirements, which are that first, the evidence sought to be adduced could not have been obtained with reasonable diligence during the trial, second, that the evidence, although it need not be decisive, it would have an important influence on the result of the case, and third, that, the evidence is credible.

Beginning with the issue of jurisdiction, the instant case is concerned with a first appeal, and there is a pending appeal before this Court, an appeal from a conviction of the applicants for the offence of murder by the High Court, in its original jurisdiction. As such, this Court has the requisite jurisdiction to hear this application for the admission of additional evidence.

In view of our finding on jurisdiction, we now turn to the other considerations. Firstly, could the applicants have obtained this evidence during the trial with reasonable diligence? In both cases, there is nothing to show that any effort whatsoever was made to obtain this evidence. Both applicants had access to legal counsel, who was in a position to obtain the extract from the Occurrence Book and the court file in *Chief Magistrates Court Civil Suit No. 110 of 2001* at Kitui. These are documents that were at all times within the public domain and available to the applicants and their counsel if they so desired it. The record does not disclose that any application was filed seeking to adduce this evidence, or that the court declined to grant such orders. We were not informed that the documents were lost and only recently been traced. Accordingly, we are not satisfied that this consideration has been fulfilled.

The next consideration is whether the evidence identified had a significant influence on the case. Learned counsel for the State has argued, that though there was reference to the extract of the Occurrence Book in the record, nothing turned on it. In our view, despite calling for this evidence, the 1<sup>st</sup> applicant has not specified, or laid any basis for adducing this evidence.

With respect to the application to produce the court file in *Chief Magistrates Court Civil Suit No. 110 of 2001 at Kitui*, we find the request to be too general and lacking in specificity. The 2<sup>nd</sup> applicant has not provided any details of the particular additional evidence sought to be introduced from the court file. He has merely indicated that the material on the file will resolve the issue of motive and malice aforethought. Nothing was said of the actual evidence sought, how it would be applied or affect the result of the case.

In view of the above, we are not therefore convinced that the additional evidence sought to be adduced will have any significant impact on the outcome of the pending appeal, or that it would be relevant or necessary for the determination of this appeal. And no sufficient reason has been advanced in support of the applications.

Accordingly, the necessary pre conditions for adducing additional evidence not having been satisfied, we find that the 1<sup>st</sup> applicant’s Notice of Motion dated 17<sup>th</sup> June 2016 and the 2<sup>nd</sup> applicant’s Notice of Motion dated 16<sup>th</sup> February 2016 lack merit, and we are constrained to order that they be and are hereby dismissed.

**It is so ordered.**

**Dated and delivered at Nairobi this 28<sup>th</sup> day of September 2018.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**